

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-2079

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

vs.

ANTHONY DELUTRO,

Defendant-Appellant

ORIGINAL

B
PLS

**BRIEF AND APPENDIX
FOR DEFENDANT-APPELLANT**

H. ELLIOT WALES

Attorney for Defendant-Appellant

122 East 42nd Street

New York, New York 10017

(212) 682-6806



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	Page
Point I.	5
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

Cheely v. United States, 535 Fed. 2d 934 (CA. 5, 1976)	8
Halladay v. United States, 394 U.S. 831 (1969)	5
Manley v. United States, 432 F. 2d 1241 (CA. 2, 1970)	5, 6
McCarthy v. United States, 394 U.S. 459 (1969)	5
United States v. Jones, 440 Fed. 2d 466 (CA. 2, 1971)	6

Statutes Cited:

18 U.S.C. 2255	1, 4, 8
--------------------------	---------

Rules Cited:

Rule 11	5
-------------------	---

Contents

Page

APPENDIX

Docket Entries	A
Opinion (Dated May 10, 1977)	A1
Opinion (Filed June 17, 1977)	A2
Notice of Appeal (Dated July 7, 1977)	A3
Notice of Motion (Dated November 22, 1976) .	A4
Minutes of Plea November 4, 1955	A8

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Docket No. 77-2079

- v -

ANTHONY DeLUTRO,

Appellate-Defendant.

APPELLANT DeLUTRO'S BRIEF
ON APPEAL

This is an appeal by the defendant, Anthony DeLutro, from the opinion and decision of District Judge, Edward Weinfeld, dated May 10, 1977, denying DeLutro's motion, without an evidentiary hearing, seeking to set aside his plea of guilty, pursuant to 18 U.S.C. 2255, with respect to a 1955 case. Docket No. 77 Civ. 287 (EW).

The plea of guilty to each of five counts was taken before the late District Judge, Sidney Sugarman on November 4, 1955. Indictment No. 148 C 267. On November 22, 1955, Judge Weinfeld did impose a sentence of two years on each of the five counts, to run concurrently. The sentence has long since been served. The plea of guilty involved an admission that the defendant was in possession of narcotics.

Subsequently in 1975 DeLutro was convicted again of a narcotic's offense. He was sentenced to a prison term of twenty-five years, as a second offender. Indictment No. 75 CR 687 (IBC)-SDNY, which conviction was affirmed by this court at 543 F. 2nd 431. As such, this collateral attack on the 1955 conviction is not an academic exercise, but is an attempt to remove a prior conviction which was utilized as a predicate for sentencing DeLutro just two years ago as a second narcotic offender.

The defendant filed his own pro se petition. The author of this brief has just been recently retained to prosecute this appeal. As such the petition in the District Court was not drafted with the same type of legal preparation and care that this author would have used if he had so represented DeLutro in the District Court. In dismissing the 2255 petition, District Judge Weinfeld wrote (A.1):

"More than 21 years after petitioner pled guilty to the sale of approximately one pound of heroin, he seeks vacatur of his conviction solely upon the basis that the then applicable provisions of Rule 11, Federal Rules of Criminal Procedure, were not complied with. However, 'only those defendants whose guilty pleas were accepted after April 2, 1969, are entitled to plead anew if their pleas were accepted without full compliance with Rule 11.' Halladay vs. United States, 394 U. S. 831, 833 (1969). Even assuming petitioner's allegations of infirmity are correct, he makes no claim nor produces any proof that his plea of guilty was not voluntarily and understandably made, or that it was constitutionally infirm in any way."

"Significantly petitioner was represented by a former Assistant United States Attorney who later, as a private attorney, conducted an extensive criminal practice in this and other courts; yet no affidavit from him has been submitted nor any explanation offered for its absence.

"Accordingly, the petition is dismissed."

Subsequently DeLutro filed an application for reargument, which application Judge Weinfeld denied as follows (A2):

"The within motion is deemed an application for reargument and is denied."

A timely notice of appeal was filed.

The transcript of the minutes of the plea are set forth in the appendix in its entirety at pages 8 through 11. With respect to each of the five counts, the Clerk of the Court read the count, and asked the defendant if he understood it. In each instance the defendant answered simply yes. Then the Clerk asked the defendant if he plead guilty or not guilty, and the defendant answered guilty. The Clerk asked him if it was to all counts, and the defendant answered yes. In substance that is the full extent of the colloquy between the Court and the defendant with respect to the taking of the plea.

It is submitted that the record of the plea is so sparse as to provide no record at all for our having any confidence that the plea was made either voluntarily or with an understanding of the nature of the charge. It is submitted that Judge Weinfeld was in error when he denied the pro se application to set aside the conviction, without conducting an evidentiary hearing. At this time all we ask is for a remand so

that the District Court can conduct such an evidentiary hearing. We submit that the pro se 2255 petition, while concededly not artfully drafted by a layman, has in it enough language to support the claim that the plea was made involuntarily and without an understanding of the charges. The minutes of the plea by itself do not reflect any understanding of the charges by the defendant, nor do they answer the question as to whether or not the plea was made voluntarily. As such, an evidentiary hearing is necessary to resolve these issues.

POINT I

As this plea was taken prior to 1969, we are not dealing with the automatic prejudice rule as enunciated by the high court in McCarthy vs. United States, 394 U. S. 459 (1969) whenever there is a non-compliance with the strict mandates of Rule 11. In Halladay vs. United States, 394 U. S. 831, 833 (1969), the Supreme Court held that with regard to a pre-1969 collateral attack on a plea of guilty, the defendant may still collaterally attack the pleas lack of voluntariness, whenever the transcript of the minutes of the plea shows that there was not a strict compliance with Rule 11. As such, the high court fashioned a case by case determination of the voluntariness of the plea. Halladay authorized an evidentiary hearing to determine whether there was ample evidence to support a finding that a plea was made voluntarily with understanding. Two cases from this court support the defendant's position that an evidentiary hearing is necessary to resolve the factual issues if the transcript of the minutes of guilty do not show a factual basis for the plea, or a basis for a finding of voluntariness, or an understanding that the defendant was aware of the maximum possible sentence he faced. In Manley vs. United States, 432 F. 2nd 1241 (CA 2 1970), which was an en banc opinion, this Court held that an evidentiary hearing is not necessary only if the record of the District Court shows a factual basis for the plea. As such,

this Court held that a remand for an evidentiary hearing is necessary, if the record does not disclose such a factual basis for the plea. In that regard Judge Lumbard wrote (432 F. 2nd at 1244):

"With respect to pleas of guilty taken prior to April 2, 1969, we construe the holdings of McCarthy and Halladay not to require any further inquiry into whether the Judge in accepting the plea of guilty had satisfied himself if there was a factual basis for the plea if it is apparent in the record of the case that there was a factual basis for the plea which was known to the Judge who imposed sentence."

Subsequently, in United States vs. Jones, 440 Fed. 2nd 466, (CA-2 1971), this Court again was confronted with a pre-1969 plea. See 440 Fed. 2nd at 468. Again this Court remanded the matter back to the District Court for an evidentiary hearing to make a finding as to whether or not the defendant knew the consequences of his plea, which included the maximum possible sentence. This Court held that the maximum possible sentence is a "consequence" of the plea, and that a guilty plea cannot be accepted unless the District Court determines that the defendant is aware of the maximum penalty of the offense. Furthermore, the panel cited the en banc opinion in Manley supra, and wrote (440 Fed. 2nd at 168):

"Proper remedy in the face of such a factual issue is to remand to the District Court for a hearing to determine whether Jones was aware of the maximum possible sentence at the time of his guilty plea, and, if not, whether Jones would not have pleaded guilty if he had been so aware, as he now asserts."

It is beyond dispute that the transcript and the minutes of the plea do not show any inquiry or basis for the factual basis of the plea, the voluntariness nature of the plea, or the understanding of the plea as to the maximum possible sentence. As a matter of fact, the plea before Judge Sugarman was as stripped of flesh and as bare boned as any plea could possibly be. Nothing was asked, and nothing was said, other than to ask the defendant if he wished to plead guilty.

Unfortunately the pro se papers of the defendant himself were not artfully drawn, and the affidavit does not specifically mention that the plea was made without an inquiry into its consequences, or an inquiry into the voluntary nature of the plea. The pro se memorandum submitted by the defendant himself in the District Court did discuss the voluntary issue of law, in addition to the non-compliance with Rule 11. As such Judge Weinfeld was perhaps a little too strict in requiring the defendant to tow the mark the same standards that attorneys would be required to comply with with regard to allegations in the petition as to the lack of understanding or the lack of the voluntary nature of the plea. Also, the absence of an affidavit from defendant's then counsel, Moses Kove, Esq., should not have been fatal, as Judge Weinfeld would like us to believe. DeLutro has been confined in Federal Prison in Atlanta the past several years. Moses Kove has retired from the practice of law, and has also retired from his service as a Commissioner with the

City of New York. Thus, it is understandable that DeLutro was not able to communicate with Moses Kove. Obviously, on an evidentiary hearing after a remand, now that this attorney is representing DeLutro, the matter can be better developed so that there is no gaps in the petition and the proceedings.

Nor does the opinion in Cheely vs. United States, 535 Fed. 2nd 934, 935 (CA-5, 1976) cited by Judge Weinfeld in his memorandum opinion pose any problem.

In Cheely the District Court held a lengthy hearing to determine the voluntariness of Cheely's plea. 535 Fed. 2nd at 934. As such the Fifth Circuit did write at 535 Fed. 2nd 934:

"A plea is involuntary if it was made in ignorance of its consequences, including the length of any possible sentence.

"The record of the plea proceeding shows that the Judge did not inform Cheely of the consequences of his plea. The lower Court held an extensive hearing on Cheely's 2255 Petition to determine the voluntariness of Cheely's plea. At this hearing the counsel who represented Cheely at the plea testified that he had informed Cheely of the consequences of that plea. Cheely's testimony contradicted the attorney's. The Court chose to credit the attorney's testimony."

CONCLUSION

The appeal from this 2255 application denial involves more than the two year prison sentence that the defendant completed serving more than twenty years ago. It involves the first step in a multi-step

procedure to remove the predicate prior conviction which was used 20 years later to substantiate a 25 year sentence which was imposed upon the defendant DeLutro as a second offender narcotic conviction. The transcript of the plea leaves much to be desired, and shows that the District Court made no inquiry of any kind whatsoever. The pro se application of the defendant himself should have been drafted more carefully with a recognition of the many decisions and opinions of this Court. Unfortunately defendant is not an educated man, and just was not up to the task. The District Court denied the application summarily without an evidentiary hearing. Such a hearing is in order to fully develop the many issues implicit in the petition. We request a remand for the purpose of such an evidentiary hearing.

Dated: New York, New York

Respectfully submitted,

October , 1977

H. ELLIOT WALES
Counsel for Appellant, Anthony DeLutro
122 East 42nd Street
New York, New York 10017
Telephone: 212 682-6806

ATTORNEYS

For U. S.:

ANTHONY C. DeLUTRO

For Defendant:

[illegible]

DATE	PROCEEDINGS
2-7-77	Filed transcript of record of proceedings, dated Nov 22, 1955
4-21-77	Filed petition to vacate sentence
4-21-77	Filed notice of referral to J. Cooper
4-25-77	CASE REASSIGNED TO JUDGE WEINFELD- ATTY'S NOTIFIED- Copy of reassignment sent to plttf by Dkt. Clerk
5-11-77	Filed Govt's memo in oppositon to petitioners motion to vacate guilty plea
5-11-77	Filed memo end on (petitioner's) motion dated 1-7-77- More than twenty-one years after petitioner pled guilty, he seeks vacatur of his conviction solely on the basis that the then applicable provisions of Rule 11 were not complied with. However " only those deft's whose guilty pleas were accepted after 4-2-69 are entitled to plead anew if their pleas were accepted without full complaine with Rule 11" Petitioners Atty never submitted any affi nor was any explanation offered for its . . . Accordingly the petition is dismissed....WEINFELD, J. M/N & copy sent to Petitioner by Dke Clerk

BEST COPY AVAILABLE

B

DATE

PROCEEDINGS

20-77	Filed def's motion for relief from final judgment pursuant to Rule 60 (b) Fed. Rules
27-77	Filed memo and on motion fld 6-20-77 - The within motion is deemed an application for re-argument and is deniedWEINFELD, J. (see 77 CIVIL 287) (copy mailed to def)
13-77	Filed notice of appeal from the motion entered on May 11, 1977 & the subsequent denial of his motion for re-argument on June 17, 1977 Mailed notice to def & U.S. Atty

A TRUE COPY

RAYMOND A. FERGUSON, Clerk

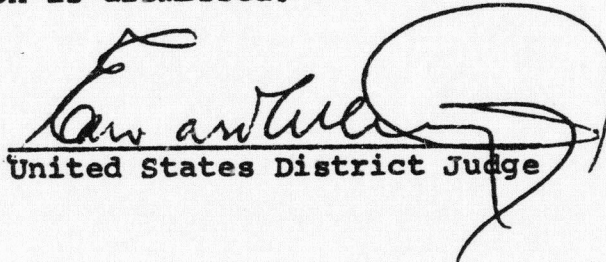
Deputy Clerk

More than twenty-one years after petitioner pled guilty to the sale of approximately one pound of heroin, he seeks vacatur of his conviction solely upon the basis that the then applicable provisions of Rule 11, Fed. R. Crim. P., were not complied with. However, "only those defendants whose guilty pleas were accepted after April 2, 1969, are entitled to plead anew if their pleas were accepted without full compliance with Rule 11." *Halliday v. United States*, 394 U.S. 831, 833 (1969). Even assuming petitioner's allegations of infirmity are correct, he makes no claim nor adduces any proof that his plea of guilty was not voluntarily and understandingly made, or that it was constitutionally infirm in any way. See, e.g., *Kercheval v. United States*, 274 U.S. 220, 223-24 (1927); *Creely v. United States*, 535 F.2d 934, 935 (5th Cir. 1976).

Significantly, petitioner was represented by a former Assistant United States Attorney who later, as a private attorney, conducted an extensive criminal practice in this and other courts; yet no affidavit from him has been submitted nor any explanation offered for its absence.

Accordingly, the petition is dismissed.

Dated: New York, N. Y.
May 10, 1977


United States District Judge

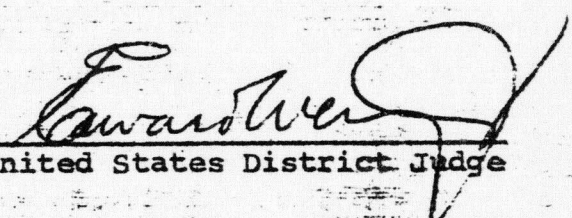
A2

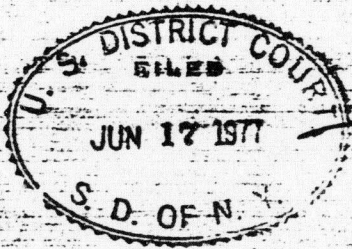
OPINION
(Filed June 17, 1977)

PRO SE 77 CIVIL 287

The within motion is deemed an application
for reargument and is denied.

June 16, 1977


United States District Judge



MICROFILM

JUN 17 1977

NOTICE OF APPEAL
(Dated July 7, 1977)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY G. BULTRIO,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

)

)

)

)

)

)

CIVIL NO: 77-11111

NOTICE OF APPEAL

Comes now the Petitioner, Anthony G. Bultrio, and notifies the Court that he will present an appeal to the Second Circuit Court of Appeals from the denial of his Motion to Vacate Sentence

on May 10, 1977, and the subsequent denial of his Motion for Re-arrest on June 14, 1977.

The Petitioner further notes that the filing fees for both the Notice of Appeal and the Appeal will be transmitted under separate cover due to the Petitioner's status as an incarcerated federal prisoner.

Respectfully submitted,

Anthony G. Bultrio, Petitioner
United States Penitentiary
Box 77-11111-111
Atlanta, Georgia 30315

July 7, 1977

A4

NOTICE OF MOTION
(Dated November 22, 1976)

(pp. A4-A7)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY C. DELUTRO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CIVIL ACTION _____

(IN RE C 148-267)

NOTICE OF MOTION

To: United States Attorney
Southern District of New York
Foley Square - U. S. Courthouse
New York, New York 10007

Sirs;

PLEASE TAKE NOTICE, that upon the annexed Motion, the Files and the Records of the case, Anthony C. Delutro, Petitioner, will move this Court for a hearing on the attached Motion to Vacate Sentence.

FURTHER, that the Clerk of this Court place the Motion on Docket for said hearing on the first day assigned by the Court for Motions, thereby granting a prompt disposition.

FURTHER, that the Court ORDER the United States Attorney to issue the writs necessary to produce the Petitioner at said hearing.

Respectfully submitted,

Anthony C. DeLutro

Anthony C. Delutro, Petitioner
United States Penitentiary
Box PMB-00895-158
Atlanta, Georgia 30315

Dated: 11-22-76, 1976.

A5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY C. DELIBRO,

Prisoner

CIVIL ACTION

v.

APPELLATE

UNITED STATES OF AMERICA,

Respondent

STATE OF GEORGIA)

vs.

GOVERNOR OF GEORGIA)

ANTHONY C. DELIBRO, who, after being duly sworn according to law,
on oath, deposes and says as follows:

That he is presently incarcerated at the United States Penitentiary,
Atlanta, Georgia; of legal age, and is the Prisoner in the Attached
Motion to Vacate Sentence in Criminal Case Number C-315-67.

That the allegations in the attached Motion are true and correct
to the best of his knowledge and belief, and supported by the records and
the files of the case.

That the reason for the untimely Motion to Vacate Sentence is that
the Affiant was not aware that the sentence and conviction was uncon-
stitutional; in that the Court failed to comply with Rule 11, Federal
Rules of Criminal Procedure.

FURTHER AFFIANT SAYETH NOT:

Anthony C. DeLibro
Anthony C. DeLibro, Affiant

SWORN TO AND SUBSCRIBED BEFORE ME THIS _____ DAY OF _____, 1976.

PAROLE OFFICER

Noted and approved by the Act.
July 7, 1968 17/Minister Cells (18 U.S.
C 301).

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ANTHONY DELIBEO,

Petitioner

) **CIVIL ACTION**

(IN RE GLE DELIBEO)

vs

UNITED STATES OF AMERICA,

Respondent

) **MOTION TO VACATE SENTENCE PURSUANT**
) **TO TITLE 18 U.S.C. SECTION 3553**

COMES NOW the Petitioner Anthony Delibeo, and respectfully moves this Court pursuant to Title 18 United States Code Section 3553 to Vacate Sentence and the aside the Judgment of Conviction imposed on him after a plea of guilty in Criminal Case Number G-88-247. In support of this Motion the Petitioner does aver:

(1)

That he is a federal prisoner incarcerated at the United States Penitentiary, Atlanta, Georgia; serving a sentence of Twenty-five (25) years with a Six (6) Year Special Parole Term to follow in violation of the Controlled Substance Act.

(2)

That the present sentence was imposed from Criminal Indictment No. 75-CR-667, on December 3, 1975, by the Honorable L. R. Corman, Judge, United States District Court for the Southern District of New York at New York City.

(3)

That the sentence imposed under G-88-247 was used by the Court to enhance the present sentence, making the Petitioner a "felony

A7

Offender" for sentencing purposes.

(4)

That the Sentence and Conviction obtained subsequent to a plea of guilty in Criminal Case Number C-148-267 is Constitutionally invalid, null and void; in that the Court failed to comply with Rule 11 F.R.Cr.P. in accepting the Plea of Guilty.

(5)

That such a failure by the Court is a deprivation of the Petitioner's rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, WITH JUST CAUSE SHOWN, supported by the Record and the Files of the Case, and the Memorandum of Law attached, the Petitioner Prays the Court grant this motion, remand for an evidentiary hearing, and after such hearing to vacate the sentence, set aside the Judgment of Commitment and dismiss the Indictment with prejudice.

Respectfully submitted,

Anthony De Luteo

Anthony DeLuteo, Petitioner
United States Penitentiary
Box 702-00005-156
Atlanta, Georgia 30315

Date: 11-22, 1976.

MINUTES OF PLEA NOVEMBER 4, 1955
(pp. A8-A11)

UNITED STATES OF AMERICA

vs.

ANTHONY C. DeLUTRO.

New York, November 4, 1955

Before: Hon. Sidney Sugarman, D.J.

For the Government: Herbert M. Wachtell, Esq.

For the Defendant: Moses Kove, Esq.

MR. WACHTELL: May the record show
that I am handing defendant's counsel a
copy of the indictment.

(Second call:)

MR. KOVE: Guilty.

THE CLERK: Anthony C. DeLutro?

THE DEFENDANT: Yes.

THE CLERK: The first count of this
Indictment charges that on or about the
22nd of September, 1955, you did, with Matthew
C. Ruby, unlawfully, wilfully and knowingly
receive, conceal, sell and facilitate the
transportation, concealment and sale of

approximately 424 grains of heroin.

Do you understand that?

THE DEFENDANT: Yes.

THE CLERK: Not named in the second count, your Honor.

The third count charges that on or about the 4th of October, 1955, you together with Matthew C. Ruby, did unlawfully, wilfully and knowingly receive, conceal, sell and facilitate the transportation, concealment and sale of approximately 2 ounces 203 grains of hereoin.

Do you understand that?

THE DEFENDANT: Yes.

THE CLERK: The third count is a similar violation dated the 11th of October, 1955.

THE COURT: Which count is that?

THE CLERK: The fourth.

THE COURT: You said the third.

THE CLERK: I beg your pardon.

THE COURT: Not named in the second count but named in the first, third and fourth?

MR. KOVE: And the fifth and sixth.

THE CLERK: Named in all except the second.

THE COURT: Yes.

THE CLERK: The fourth count is dated the 11th of October, 1955, and charges that you did unlawfully sell 2 ounces 177 grains of heroin.

Do you understand that?

THE DEFENDANT: Yes.

THE CLERK: The fifth count is also a similar violation. The date is the 18th of October, 1955, and the amount is approximately 493 grains of heroin.

Do you understand that?

THE DEFENDANT: Yes.

THE CLERK: The sixth and last count is also a similar violation and is dated the 27th of October, 1955. The amount is approximately 9 ounces of heroin..

Do you understand all those charges.

THE DEFENDANT: Yes.

THE CLERK: Do you plead guilty or not guilty?

All

THE DEFENDANT: Guilty.

THE CLERK: To all counts in which you
are named?

THE DEFENDANT: That is right.

MR. KOVE. May we have a probation
report, your Honor?

(Mr. Wachtell made a statement to the
Court on behalf of the Government).

(Mr. Kove made a statement to the
Court on behalf of the defendant).

(Pre-sentence report ordered and
sentence adjourned to November 22, 1955).

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

- against -

ANTHONY DELUTRO,
Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 112 West 136th Street; New York, New York

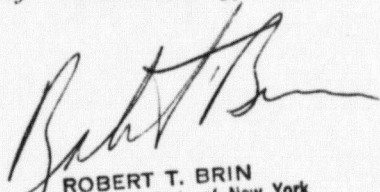
That on the 17th day of October, 19 77 at 1 St Andrews Plaza
New York, New York

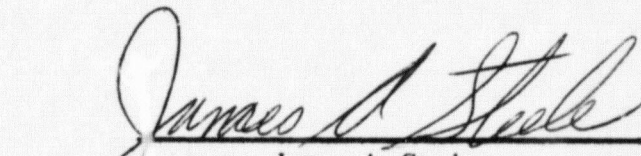
deponent served the annexed
Appendix \
Brief

upon
U.S. Attorney Southern District
Robert B. Fiske, Jr.

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 17th
day of October 19 77


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 - 0418950
Qualified in New York County
Commission Expires March 30, 1979


James A. Steele